

STATE OF MICHIGAN
COURT OF APPEALS

SIDNEY FRANK IMPORTING COMPANY,
INC.,

UNPUBLISHED
July 31, 2014

Petitioner-Appellant,

v

DEPARTMENT OF TREASURY,

No. 315610 and 315963
Tax Tribunal
LC No. 00-383623

Respondent-Appellee.

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Petitioner appeals as of right the final order of the Tax Tribunal on remand finding that petitioner was not entitled to alternative apportionment relief under MCL 208.69. We reverse and remand to the Tribunal for consideration of the merits of petitioner's claim.

I. BACKGROUND

At issue in this case is the tax treatment of petitioner's sale of its interest in Grey Goose vodka. The Tax Tribunal held that it was not a "sale" under MCL 208.7(1)(a) of the now-repealed Single Business Tax Act (SBTA), MCL 208.1 et. seq. The Tribunal also found that petitioner had waived any right to apportionment relief under MCL 208.69. Petitioner appealed, and this Court agreed with the Tribunal that the transaction at issue was not a "sale" under MCL 208.7(1)(a). *Sidney Frank Importing Co Inc*, unpublished opinion of the Court of Appeals, issued December 4, 2012 (Docket No. 306742), p 8. We however disagreed that petitioner had waived the issue of relief under MCL 208.69. Petitioner filed a motion with this Court to supplement the record to include a letter from petitioner's attorney to a senior auditor with respondent dated July 10, 2009, in which petitioner's attorney raised the issue of apportionment relief under MCL 208.69. This Court granted the motion. *Sidney Frank Importing Co Inc v Dep't of Treasury*, unpublished order of the Court of Appeals, entered July 12, 2012 (Docket No.

306742).¹ It is uncontested that respondent never responded to the letter. *Sidney Frank Importing*, unpub at 9.

Because the parties did not present this evidence to the [Tax Tribunal], the [Tax Tribunal] concluded that petitioner had waived the issue and never reached the merits of the argument. However, now that this Court has allowed petitioner to supplement the record, it is clear that petitioner did not waive this matter. Therefore, we remand this issue to the [Tax Tribunal] for consideration of the newly supplied documents and for a determination of whether petitioner was entitled to alternative apportionment under MCL 208.69. [*Sidney Frank Importing*, unpub at 9.]

On remand, without further briefing by the parties or a hearing, the Tribunal issued a final opinion and judgment on March 20, 2013, holding that petitioner was not entitled to apportionment relief under MCL 208.69:

Pursuant to the Court of Appeals' directive, the Tribunal has reviewed the supplemental information submitted by Petitioner under MCL 208.69. . . .

. . . The parties have stipulated that no response was received from the commissioner regarding Petitioner's request for alternative apportionment. As such, the Tribunal concludes that the commissioner did not approve Petitioner's request and therefore, Petitioner's argument under MCL 208.69 directly contradicts the explicit language and therefore, must fail. [Final opinion and judgment on remand, 3/20/13, pp 2-3.]

II. STANDARD OF REVIEW

"Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007), citing *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998). "The Tax Tribunal's factual findings are final if they are supported by competent, material, and substantial evidence on the whole record." *Michigan Prop, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012). "If the facts are not disputed and fraud is not alleged," this Court's review "is limited to whether the Tax Tribunal made an error of law or adopted a wrong principle." *Id.* at 527-528. However, this Court reviews questions of statutory interpretation de novo. *Id.* at 528.

¹ Judge Krause would have denied the motion. *Sidney Frank Importing Co Inc v Dep't of Treasury*, unpublished order of the Court of Appeals, entered July 12, 2012 (Docket No. 306742).

III. THE TRIBUNAL'S CONSIDERATION OF PETITIONER'S ENTITLEMENT TO ALTERNATIVE APPORTIONMENT RELIEF UNDER MCL 208.69

Petitioner correctly asserts that the Tribunal failed to comply with this Court's instructions on remand. Accordingly, we find that the Tribunal erred when it determined that the Commissioner's non-response to petitioner's request for alternate apportionment relief under MCL 208.69 was equivalent to the Commissioner not approving the relief.

MCL 208.69 was part of the SBTA, which was repealed by 2006 PA 325. It provided in pertinent part as follows:

(1) If the apportionment provisions of this act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the commissioner may require the following, in respect to all or a part of the taxpayer's business activity, if reasonable:

(a) Separate accounting.

(b) The exclusion of 1 or more of the factors.

(c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state.

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.

(2) An alternate method will be effective only if it is approved by the commissioner.

(3) The apportionment provisions of this act shall fairly represent the business activity attributed to the taxpayer in this state, taken as a whole and without a separate examination of the specific elements of the tax base such as depreciation, compensation, or income, unless it can be demonstrated that the business activity attributed to the taxpayer in this state is out of all appropriate proportion to the actual business transacted in this state and leads to a grossly distorted result. A taxpayer's business activity shall be presumed to be fairly represented if the adjusted tax base computed without regard to the reduction based upon gross receipts permitted by section 31(2) is not greater than the adjusted tax base computed after application of the reduction based upon gross receipts permitted by section 31(2) or if the adjusted tax base is not greater than the adjusted tax base which would result from an apportioned tax base computed by using the apportionment formula prescribed for a corporate income tax or franchise tax in the taxpayer's business domicile. The taxpayer's business domicile is the state in which the sum of the taxpayer's payroll factor and property factor is greatest. However, if the taxpayer fails to satisfy either of these tests, the taxpayer's business activity shall not be presumed to not be fairly represented.

The Tribunal initially declined to consider whether petitioner was entitled to relief under MCL 208.69 because it found that petitioner had waived the issue by failing to petition the commissioner² as required by MCL 208.69(2). However, on appeal, this Court permitted petitioner to supplement the record to include a letter from petitioner's attorney to a senior auditor with respondent in which petitioner's attorney raised the issue of apportionment relief under MCL 208.69. *Sidney Frank Importing Co Inc v Dep't of Treasury*, unpublished order of the Court of Appeals, entered July 12, 2012 (Docket No. 306742). It is uncontested that respondent never responded to that letter. *Sidney Frank Importing*, unpub at 9. This Court found that because petitioner had sent the letter, it had not waived the issue. *Id.* The Court accordingly remanded this case to the Tribunal "for consideration of the newly supplied documents and for a determination of whether petitioner was entitled to alternative apportionment under MCL 208.69." *Id.*

On remand, the Tribunal concluded that it could not grant petitioner relief under MCL 208.69(1) because the commissioner had not responded to the request for relief, which the Tribunal characterized as a failure to approve such relief. The Tribunal stated that because the commissioner had not approved apportionment relief, "Petitioner's argument under MCL 208.69 directly contradicts the explicit language and therefore, must fail". "It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *Rodriguez v General Motors Corp*, 204 Mich App 509, 514; 516 NW2d 105 (1994) citing *People v Bellanca*, 43 Mich App 577, 579; 204 NW2d 547 (1972). The Tribunal failed to comply with this Court's order on remand. Our order was for the Tribunal to consider the merits of petitioner's claim for entitlement to alternative apportionment relief. The plain language of MCL 208.69(1) requires petitioner to petition for the relief or for the Commissioner to take certain actions in relation to petitioner's business activity to determine whether alternative apportionment relief is appropriate. MCL 208.69(1)(a)-(d). Despite, which party acts first, in order for the alternate method to be effective, it must be approved by the Commissioner. Here, we only have the Commissioner's silence on the issue. "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959). In order to genuinely consider the merits of petitioner's claim, an unequivocal response from the Commissioner is required. Although it possessed authority to do so, the Tribunal did not request further briefing, demand responses or hold a hearing on remand. The Tribunal's conclusion that the Commissioner's silence constituted a denial of relief was not "supported by competent, material, and substantial evidence on the whole record." *Michigan Prop, LLC*, 491 Mich at 527. Given the facts here, there was no evidence to indicate the Commissioner even considered petitioner's request for alternate relief. The Tribunal's conclusion was in fact an assumption that can just as easily be inferred in the other direction to demonstrate the Commissioner's acquiescence.

Accordingly, we reverse the Tribunal on the ground that a non-response by the Commissioner does not constitute a denial. We order the Commissioner to respond to

² "Commissioner" was defined under the SBTA as respondent. MCL 208.4(2), (5).

petitioner's claim for alternative apportionment relief and remand to the Tribunal for further proceedings consistent with this Court's prior opinion and following the Commissioner's response. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Cynthia Diane Stephens